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ABSTRACT

Most state legislatures have either passed or taken under consideration for passage some minimum competency testing program. However, it is not clear that these legislative efforts will result in implementation programs that fulfill legislative intent. Throughout the United States legal challenges from students adversely affected by testing programs have been initiated. While still in the courts, these cases point up the difficulties in design and implementation efforts compelled by legislation requiring minimum competency testing. The legal issues on which this recent litigation is based present conflicting legal mandates to those charged with the responsibility of effectuating minimum competency testing programs. This paper focuses on the relationship between state accountability and the child's educational rights and provides a set of guidelines for educators who seek to avoid the pitfalls of litigation involved in the contradictions between legislative and judicial mandates. (Author/MLF)

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DEALING WITH THE CONTRADICTION BETWEEN JUDICIAL AND LEGISLATIVE COMPETENCY TESTING MANDATES

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Among the states, implementation of minimum competency testing programs has taken various forms. Early statutory formulas focused first on measuring performance in basic skills, with statutes amending initial provisions in order to establish requirements for certification of graduation. Today, legislative enactments have enlarged the scope and purpose of competency testing, often requiring school districts to adopt proficiency standards in basic skills; assess student performance periodically from entry through 12th grade; and, after an identified time period has elapsed, deny the diploma to any student who fails to meet the locally adopted proficiency standards. Included within these recent statutory guidelines are procedures to insure timely notice and hearing which resemble guidance conferences with students and parents, proposals for citizen participation in the establishment of standards, and provisions for state department of education assistance in developing assessment mechanisms and testing protocols.

Most state legislatures have either passed or taken under consideration for passage some minimum competency testing program. However, it is not clear that these legislative efforts will result in implementation programs that fulfill legislative intent. Throughout the United States legal challenges from students adversely affected by testing programs have been initiated. While still in the courts, these cases point up the difficulties in design and implementation efforts

compelled by legislation requiring minimum competency testing. The legal issues on which this recent litigation is based present conflicting legal mandates to school personnel and lay persons charged with the responsibility of effectuating minimum competency testing programs.

The diverse legal implications of minimum comptency testing now being considered in our courts, offer some judicial messages which are clear. Basic legal propositions supporting a child's right to an education continue to be affirmed, but the State's right to require some form of minimum competency testing is being acknowledged and supported. This paper focuses on the relationship between state accountability and the child's educational rights, and provides a set of guidelines for educators who seek to avoid the pitfalls of litigation involved in the contradictions between legislative and judicial mandates.

Equal Educational Opportunity

It is ironic that competency testing was originally and ostensibly designed to measure the performance of school districts and individual schools. The irony is that much of the present legislation focuses on the student, not the school, with the result that the onus of poor schooling appears to impact primarily on the individual student. Since most statutes require a minimal competency level for graduation or promotion, it would now seem to be the student's responsibility to achieve the level of competence compelled by the testing program.

Placing the responsibility for learning solely on the student ignores the powerful influence of legal mandates affecting public education. Litigation, particularly in the last two decades, has extended

right of access to public education for the handicapped, the retarded and other groups [PARC v. Commonwealth (Pa. 1971) and Armstrong v. Kline (Pa. 1979)]. State constitutional mandates for "thorough and efficient" education have been interpreted to guarantee some minimal level of financial equity in educational opportunities provided by public school systems [Serrano v. Priest (Ca. 1976) and Robinson v. Cahill (N.J. 1976)]. In addition, courts have become concerned with challenges to educational programs and placement practices that allegedly deny educational opportunities appropriate to the student's individual needs [Hobsen v. Hansen (D.C. 1976) and Lau v. Nichols (1973)]. The meaning of these decisions, ranging from desegregation to special education, is that our courts have placed responsibility for insuring educational opportunity squarely upon the nation's public school system.

In its simplest form, however, minimum competency testing creates a direct conflict with the judicial and legislative mandates guaranteeing equal educational opportunity. When the testing requirement has the effect of denying the certificate of graduation or promotion, when the primary impact of the standardized test can be interpreted to deny an educational benefit, then minimum competency testing may arguably be found to deny equally of educational opportunity. Where that denial appears arbitrary or caprious, where it suggest unreasonable discriminatory impact, where it interferes with a legally recognized right to educational benefits, the likelihood of litigation will increase.

Discrimination Under Equal Protection

Where a student alleges the denial of a fundamental right to equal

protection of the laws, and presents convincing evidence that official action is grounded upon racially or ethnically based discriminatory practice, courts will require the state to show a compelling interest for the alleged discriminatory practice under review. Thus, if significantly large numbers of racially or ethnically identifiable students fail to achieve satisfactorily on the minimum competency examination, in comparison with other student groups, then the testing program is likely to be subject to legal challenge on the grounds of discrimination in violation of equal protection of the laws (see Debra P. v. Turlington, *infra*). Where a school district or the state has been found to have engaged in a past pattern and practice of official segregation, the state would have to establish a "compelling interest" for continuing the testing program. Such a heavy burden of proof would be required to establish that a state has a compelling interest in the conduct of its minimum competency testing program that it is unlikely the test would meet equal protection standards.

Discrimination Under Title VI

In Lau v. Nichols (1974), the United States Supreme Court relied solely on Title VI in holding that non English-speaking minority students were denied a meaningful opportunity to participate in the educational program because the public schools failed to provide sufficient supplemental courses in English for the national origin minority. Inherent in the court's opinion was the necessity of providing an educational program with sufficient compensatory and remedial assistance to make the educational experience meaningful and effective at the individual level. Judicial confirmation of the Title VI regulations

suggests that any minimum competency program which has a disproportionate impact on a minority protected by Title VI would be subject to the same judicial standards.

Lau also illustrates the problem of a testing program which fails to meet the needs of non-English speaking and national origin minority students. Where such a student is either excluded from school or placed in a class for special educational services as the result of a minimum competency test, a legal challenge under Title VI may result. A case illustrating this legal challenge, Diana v. California State Board of Education (1970), involved Mexican-American children placed in an EMR class based on I.Q. testing in English by a school psychologist. Evidence of significantly better performance on non-verbal portions of the tests and of higher test scores when retested by a bilingual psychologist who permitted answers in Spanish was presented to the court. The result was an in-court stipulation agreement that future tests would use both English and the child's native language in order to assess I.Q. for placement purposes. Similar assignments of non-English speaking children based on minimum competency tests utilizing the English language alone may violate Title VI.

On the other hand, demonstrating competency in the English language on a minimum competency examination may be an explicit educational objective of a school district's testing program. Most tests do appear to emphasize reading and writing in order to meet requirements for the diploma or for placement and promotion within the district, thus special attention must be given in order to resolve conflicts between Title VI guidelines and minimum competency standards. Some of the recommendations

in the Diana case may prove helpful. Where placement is a key objective, utilization of the child's primary language and English would seem appropriate in testing for competency in other subject areas and for competencies other than English language ability. In addition, scores would appear to require substantiation through other forms of evaluation in addition to the minimum competency test.

In another case involving I.Q. testing a federal district court has ruled that use of a standardized intelligence test violated Title VI, the Rehabilitation Act of 1973 and the Education of All Handicapped Children Act of 1975. In Larry P. v. Riles (Ca. 1979), the court found that the standardized tests were racially and culturally biased, had not been validated for purposes of placement of black children in classes for the mentally retarded and result in a discriminatory impact on black children who, as a consequence, were substantially overrepresented in the special EMR classes. This decision is the first to hold that I.Q. tests employed for placement purposes by a school district are unlawfully discriminatory as applied to a specific minority group. In an extension of the logic of this decision, it seems reasonable to conclude that a minimum competency test which results in a disproportionate impact on minority students, coupled with evidence that the tests have never been validated on the specific minority group affected, would be struck down as a violation of federal law.

Discrimination Under the Rehabilitation Act

The potential for unfair discrimination in the application of minimum competency testing programs would appear to extend to handicapped students if the language of Section 504 of the Rehabilitation Act of 1973

is held to be comparable to that of Title VI. Section 504 requires that:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

With regard to the handicapped, however, a special problem of interpretation and application of statute law exists. Handicapped children must be integrated into the public school's regular education program to the maximum extent appropriate, but special treatment of the handicapped may be necessary in a number of contexts in order to ensure equal opportunity. Minimum competency testing adds to this problem by raising questions as to the level of participation or exemption of handicapped students relative to testing and as to appropriate standards to be applied in assessing competency and awarding diplomas. Any policy presumption excluding a handicapped student from participation in the minimum competency testing program would appear to violate the requirement of integrating the student into the regular educational program to the maximum extent possible. Alternatively, failure to provide differential standards and alternative modes of testing to the handicapped person who needs special treatment may violate the individual's right to benefit from educational programs meaningful and effective for the handicapped individual.

One answer to this problem in the incorporation of an individualized minimum competency testing protocol within the Individualized Education Program (IEP) required for each handicapped child under the Education for All Handicapped Children act of 1975. Individual decisions about minimum competency testing programs applied to the specific capabilities of the handicapped child could then be made relative to exemption from

the program, application of a differential standard for award of the diploma, and the use of differential assessment procedures in consideration of the extent and severity of the student's handicap. For purposes of minimum competency testing, a description of the extent to which the child can participate in the testing program and a statement of services needed to permit participation would be part of the justification compelled by the IEP.

Due Process of Law

There is no question that a student has a property right to the educational benefits guaranteed by state law. In Goss v. Lopez (1975) the United States Supreme Court concluded that expulsion or suspension from the school's educational program could infringe the student's right to educational benefits, compelling the school district to provide due process of law in disciplinary actions. The high court reasoned that the fourteenth amendment required the state to give the student due process of law where the denial of a property right might result from state action.

Minimal elements of due process in an educational setting have been defined to include the right to adequate notice prior to any school district action which would deny an educational benefit. This requirement appears to apply regardless of whether the action is considered to be disciplinary, as in Goss, or academic, as in Horowitz v. Board of Curators of the University of Missouri (1978). In the Horowitz case the Supreme Court was reluctant to interfere with the judgments of academic evaluators considering a medical student's clinical performance.

However, the Court did conclude that repeated warnings of unsatisfactory evaluations, coupled with opportunities to improve performance over the course of the student's medical training, had been sufficient notice to meet constitutional due process guidelines.

Where minimum competency tests may be used to determine placement in remedial or special education classes, or where the testing program can act to deny the diploma or certificate of graduation, a denial of educational benefits guaranteed by state law may occur. Consequently, courts are likely to give careful attention to the school district's rationale for minimum competency testing, and to assess the extent to which a denial of a student's property right to a free public education may result.

A Florida federal court has ruled that imposing minimum competency testing too hastily can result in court orders compelling the award of the diploma. Black students who failed Florida's 1978 minimum competency test had alleged that they were denied equal protection and due process of law under the Fourteenth Amendment by imposition of the Florida minimum competency requirements. In Debra P. v. Turlington (1979), the federal district court agreed with the students and ordered that the diploma be awarded to students who failed the examination but had otherwise qualified for graduation. Emphasizing the due process issue, the court found that students were not put on notice that graduation would depend on mastery of skills at the time of instruction in those skills. As a practical matter, at least six years must pass before Florida's minimum competency test, developed in 1977, can be used to deny the diploma to minority students.

The court in Debra P. linked the issue of inadequate notice to the disporportionate racial impact of the test. Many of the black students who failed the test had received their early education in segregated schools. The court concluded that a past pattern of racial segregation resulted in an inferior education which still affected the black students' performance. Under these circumstances, an elongated phase-in period for competency testing, with periodic notice to students as to what they would be required to know, was required by the courts.

Where students are informed late in their educational program that a minimum competency requirement has been posed for award of the diploma or certificate of graduation, a student or class of students might contend that notice of the requirement was inadequate. The graduation requirement would arguably violate legal notions of due process in that the significance of the degree requirement might have influenced teaching and learning during the student's previous schooling had the notice been timely. If the results of minimum competency tests fall within the realm of "academic evaluations" characterized by the Horowitz majority, then it can be argued that courts will be unlikely to grant relief provided students are allowed repeated opportunities to take the minimum competency test and are given notice of the test requirements in time to prepare themselves.

Fundamental Fairness and Reasonableness

Clearly, where a denial of substantive due process is alleged relative to minimum competency testing requirements, courts will be asked to resolve questions of adequate remediation and notice for a test which

purports to measure years of cumulative learning. It is difficult to determine how courts will resolve questions of this type, but the court will be guided by language implementing minimum competency testing and by notions of what is reasonable notice and fairness to the student. In James v. Board of Education (1977) a class action suit was brought by parents and teachers to injoin the administration of comprehensive examinations based on contentions that the integrity of the examinations had been so compromised that use of the results for purposes of promotion, admission to special programs, and allocation of funds and teachers within the school system would violate fundamental fairness. In holding that the board could not be enjoined from administering the examinations, the Court of Appeals of New York noted that "courts may not under the guise of enforcing a vague educational public policy . . . assume the exercise of educational policy vested by constitution and statute in school administrative agencies." Whether the examination had been so compromised as to lack validity as an instrument for measuring educational achievement the court chose not to decide, because statute law delegated that question to the "judgment and discretion of those responsible for the administration of public schools."

In a similar case parents challenged the authority and propriety of the Florida Department of Education in establishing basic skill and literacy requirements under Florida's minimum competency testing program. The parents charged that the legislature had improperly delegated power to set standards to the Commissioner of Education and, in addition, the Commissioner had improperly exercised discretion in setting minimum cut-off standards and scoring criteria for the minimum competency

examination. In Florida State Board of Education v. Brady (1979) a state appeals court upheld scoring criteria adopted by the Commissioner of Education as valid exercises of administrative authority. Furthermore, the appeals court ruled that proficiency in any subject was uniquely and peculiarly a matter for the field of education to decide, not a matter to be resolved by legislative or judicial authority.

James and Brady suggest that courts will be reluctant to interfere in matters of educational policy where legislative action or school board policy is based upon carefully reasoned judgments about appropriate testing requirements. Decisions related to the make-up and selection of test items, cut-off levels establishing minimum acceptable competence, and opportunities for review and re-testing are within the competence and discretion of professional educators, provided the consensus of expert judgments is based on sound educational thinking. Courts recognize that expert judgments are never totally infallible, but court do insist that the rationale for the decision avoids capricious or arbitrary action.

Implementation Guidelines

These legal considerations lead to the inescapable conclusion that educators must act with extreme caution in implementing minimum competency testing programs. Programs should be developed in stanges; begun with pilot projects or limited experimental projects initially, and then expanded as rational procedures are developed. Models of appropriate practice and searches of professional literature should be utilized in ongoing evaluation and modification of any testing program.

Procedural safeguards will vary according to state law and administrative discretion. There is no single formula for procedural rules that is best for all situations. In developing and implementing policies and procedures for minimum competency testing, consideration should be given to a number of guidelines suggested by recent litigation as follows:

1. It is not necessary to abandon the existing curriculum in order to establish a competency testing program, but once competency testing is mandated, the specification of minimum competencies must be matched with the curricular goals and objectives of the school system.

2. Evidence that actual instruction is congruent with curricular objectives and test items must be obtained in order to establish a rational basis for the testing program.

3. All test items must be carefully developed and evaluated to insure conformance with curricular objectives and to eliminate bias related to racial, ethnic, or national-origin minority status.

4. Other measures, in addition to the minimum competency test, should be used as a basis for placement or award of the diploma.

5. Special attempts should be made to overcome cultural biases inherent in the construction and administration of the competency test.

6. The setting of cut-off levels for proficiency should be a process of well-documented deliberation that conforms to any statutory requirements of the state and avoids any suggestion of capriciousness.

7. The phase-in period for minimum competency testing must include early and periodically repeated notice to students and parents.

8. The length of time required for adequate notice to students

and parents must be related to the time required to make necessary curricular or instructional changes to implement a competency-based educational program.

9. Notice would extend to the instructor's classroom comments as well as official written notification to student and parent.

10. Initially, minimum competency testing should be used primarily for identification and diagnosis of learning deficiencies, rather than to deny the diploma or certificate of graduation.

11. Several options should be available to students who fail the minimum competency examination required for graduation. Among the options are the following:

a. Opportunity to take a competency examination again at another time or at any later date in their lives.

b. Allowance for a differential standard or assessment procedure.

c. Remedial or compensatory training in the specific areas where a lack of competency was demonstrated.

12. Options should also be available to students who were previously enrolled in racially segregated schools.

13. Remedial or compensatory programs should not be so pervasive as to become a system for segregating students on the basis of race or ethnic origin.

14. Handicapped students require individual determinations with regard to the nature and extent of their participation in minimum competency programs.

The legislative mandate for some form of minimum competency testing

may not include provision for all of the elements in the guidelines suggested. But once the responsibility to implement minimum competency testing is mandated, whether by state or local district, educators are in a position to influence the elements of the program as it is initiated and administered. Through this process of implementation the educator has the opportunity to introduce those dimensions of a minimum competency testing program that conform to both legislative and judicial mandates, thus serving the need of meaningful educational opportunity.